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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

EPLUS GROUP, INC., Plaintiff and Appellant, v. BANC OF AMERICA LEASING & CAPITAL, LLC, Defendant and Respondent.	D054086 (Super. Ct. Nos. GIC878557, 37-2007-00082672-CU-BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, William R. Nevitt, Jr., Judge. Reversed.

Appellant ePlus Group, Inc. (ePlus), appeals from the judgment of dismissal entered after the trial court sustained a demurrer without leave to amend to its complaint for breach of contract, rescission and unjust enrichment against respondent Banc of America Leasing & Capital, LLC (BALC). The trial court dismissed the complaint based primarily on the "merger and bar aspect of res judicata," finding that each of ePlus's

causes of action "could and should" have been raised by ePlus in a previous action brought by BALC in Virginia.

On appeal, ePlus argues the trial court erred when it found res judicata[1] barred its claims against BALC in the instant action because, ePlus argues, such claims arose *after* it satisfied the judgment in the Virginia action, and thus were not ripe in that action. ePlus further argues that, in any event, it was not required to assert such claims in the Virginia action because Virginia does not have a compulsory counterclaim rule. ePlus thus seeks reversal of the judgment of dismissal.

As we explain, we conclude the trial court erred in sustaining the demurrer. We thus reverse the judgment of dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

ePlus, a Virginia corporation, is an equipment lessor that maintains an office in San Diego County. BALC is engaged in the business of lease financing, including within San Diego County. In 2001, ePlus, on the one hand, and BALC's predecessor-in-interest, Banc of America Vendor Finance, Inc., on the other hand, entered into a Financing Program Agreement (FPA), which BALC describes as an "umbrella agreement" between

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1 Although BALC suggests the trial court ruled ePlus's complaint was also barred by collateral estoppel, our review of the record shows the court relied exclusively on res judicata when it granted BALC's demurrer without leave to amend. We further note the parties have not argued in this appeal that collateral estoppel applies to ePlus's complaint. We thus do not address the collateral estoppel doctrine here.

the parties.[2] The FPA sets out the rights of BALC, which would either purchase or finance certain equipment leases between ePlus and third party users/lessees for commercial or business purposes.

In December 2003 ePlus submitted a "Summary of Terms and Non-Recourse Secured Loan Request" to BALC in connection with the proposed lease of computer equipment, manufactured by Teleservices Group, Inc. (Teleservices), to Cyberco Holdings, Inc., and its subsidiaries (CBI)., as guaranteed by the sole shareholder of CBI, Krista Watson.

In March 2004 ePlus and CBI, as lessee, entered into a master lease agreement and schedule for a lease intended as security to provide computer equipment to CBI (CBI equipment lease). Under the terms of the CBI equipment lease, CBI agreed to make monthly rental payments of about $101,430 for the first 36 months of the lease term and one final payment of about $348,522. A few days later, CBI executed a certificate of acceptance, representing and warranting to ePlus and its assignees that the computer equipment manufactured by Teleservices had been delivered, inspected, found to be in good order and accepted by CBI.

ePlus subsequently assigned the CBI equipment lease to BALC. In return for BALC's funding of the computer equipment, BALC received under the assignment all of ePlus's rights to the rental payments and certain other payments under the CBI equipment

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[2] The trial court granted each party's unopposed request for judicial notice in connection with BALC's demurrer, which included the FPA. ePlus subsequently requested this court take judicial notice of documents already judicially noticed by the trial court, which are part of the record before this court.

lease, as well as assigned and pledged to BALC a first security interest in ePlus's right, title and interest to the computer equipment.

In November 2004 the Federal Bureau of Investigation (FBI) uncovered a scheme by CBI, Teleservices and other principals to defraud banks and various finance companies throughout the United States. The FBI subsequently seized CBI's records and equipment and a Michigan court appointed a receiver to take possession of CBI's assets and operations. A representative of BALC inspected the equipment subject to the CBI equipment lease and discovered there was no computer equipment, but only empty computer cases with fans and lighting to make the equipment look real.

A. *The Virginia Action*

As a result, in December 2004 BALC notified ePlus of CBI's defaults under the CBI equipment lease, contended ePlus breached various representations and warranties in the FPA and demanded ePlus reimburse BALC for the "unrecovered portion" of the CBI lease agreement, as required under section 7.1 of the FPA (discussed *post*). When ePlus refused to reimburse BALC, it filed suit against ePlus in the Circuit Court of Fairfax County, Virginia, Law No. CL-2005-2803 (Virginia action), asserting causes of action for breach of contract and negligent misrepresentation, and seeking damages from ePlus in excess of $3 million, not including interest and attorney fees.

A jury was empanelled and trial commenced on September 11, 2006. The parties stipulated BALC's unrecovered investment in the CBI equipment lease was $3,025,000, but litigated the issue whether ePlus violated various representations and warranties in connection with that lease. At the conclusion of the evidence and argument, the jury on

September 14, 2006, found for BALC on its "repurchase claim" and awarded it $3.025 million. The jury also found BALC was entitled to indemnity (as provided under section 5.2 of the FPA) for its attorney fees, expenses and costs. The court at a subsequent hearing awarded BALC attorney fees of $871,231.90.

BALC subsequently commenced a Virginia garnishment proceeding against ePlus after ePlus disputed the judgment amount. The Virginia court determined the judgment amount, and ePlus satisfied it by paying BALC about $4.26 million in late May 2007, and about $2,700 three weeks later. The judgment amount was equivalent to the unrecovered investment, as provided in section 7.1 of the FPA, plus interest and attorney fees.

ePlus formally requested the Virginia Supreme Court to grant its petition for appeal, reverse and remand the case. The Virginia Supreme Court refused the petition in mid-July 2007.

B. *The Underlying Action*

In December 2007 ePlus filed the underlying action against BALC. This action was the second lawsuit filed against BALC by ePlus in San Diego County Superior Court following the conclusion of the Virginia action. The earlier action, *ePlus Group, Inc. v. Banc of America Leasing & Capital, LLC*, San Diego County Superior Court case No. GIC870557, was a suit to reform the FPA.[3] The trial court granted BALC's demurrer to ePlus's amended complaint in the contract reformation action, and by its ruling, the court

3 The reformation action (case No. GIC870557) is not the subject of this appeal.

confirmed the FPA governed BALC's dealings with ePlus. When BALC subsequently demurred to the complaint in the instant action, the two cases had been consolidated.

In its demurrer to ePlus's complaint that is the subject of this appeal, BALC argued the underlying lawsuit relied on the same contract, legal claims and litigated facts as the Virginia action. It thus argued ePlus's three claims could and should have been litigated in the Virginia action, and were thus barred by merger, res judicata and/or collateral estoppel. BALC further argued ePlus's action was an unlawful collateral attack on the Virginia action.[4]

ePlus opposed the demurrer. It argued the claims in underlying action were based on BALC's refusal to reassign the CBI equipment lease, as required under section 7.3 of the FPA, which claims, it argued, arose *after* ePlus satisfied the judgment in the Virginia action. ePlus thus argued its claims in the instant action (which we will refer to as the "reassignment claims") were not barred by any finality doctrine. ePlus further argued it was not required to assert its reassignment claims in the Virginia action because Virginia does not have a compulsory cross-complaint rule, and because such claims were based in

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4 At oral argument before this court, BALC continued to assert that ePlus's action was an impermissible collateral attack on the Virginia action because, according to counsel, ePlus never actually sought reassignment from BALC of any of the rights or remedies relating to the CBI equipment lease and because ePlus is seeking only damages against BALC in the underlying lawsuit. However, ePlus alleges in its complaint that BALC "has failed and continues to fail to re-assign" such rights and obligations arising under the CBI equipment lease, as required by section 7.3 of the FPA. As discussed *post*, for purposes of demurrer we accept as true all properly pleaded facts in the complaint. (See *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 579.) Moreover, we conclude the remedy ePlus is seeking in its complaint—damages for BALC's (alleged) breach of section 7.3—is not germane to the issue of whether any finality doctrine bars ePlus's action.

equity, and thus the Virginia court lacked jurisdiction to hear such claims because BALC sought relief in a court of law.[5]

At the conclusion of oral argument, the trial court confirmed its tentative ruling, sustaining BALC's demurrer without leave to amend. The court determined that under either Virginia or California law, "plaintiff's causes of action in the complaint are precluded . . . because the 're-assign[ment of the CBI equipment lease] as required by FPA Section 7.3' (Complaint, ¶ 19), which is the basis for each of the complaint's three causes of action, could and should have been raised [by ePlus] in the Virginia action."

DISCUSSION

A. *Standard of Review*

Following the sustaining of a demurrer without leave to amend, we review the trial court's ruling de novo and apply the abuse of discretion standard in reviewing the trial court's denial of leave to amend. (*Williams v. Housing Authority of Los Angeles* (2004) 121 Cal.App.4th 708, 718-719.) Plaintiff bears the burden of proving the trial court erred in sustaining the demurrer or abused its discretion in denying leave to amend. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459.)

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5 Until January 2006 Virginia continued to treat actions at law separately from actions in chancery. (*Williams & Connolly, L.L.P. v. People for Ethical Treatment of Animals, Inc.* (2007) 273 Va. 498, 517, fn. 6 [643 S.E.2d 136, 145].) However, Virginia abolished this distinction beginning January 1, 2006. (*Ibid.*) ePlus has wisely abandoned this argument on appeal.

For purposes of analyzing the ruling on demurrer, we give the pleading a reasonable interpretation, reading it as a whole, its parts in their context, to determine whether sufficient facts are stated to constitute a cause of action and/or a right to relief. (See *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38.)

We accept as true all facts properly pleaded, evidentiary facts found in exhibits attached to the complaint and facts that may be implied or inferred from those expressly alleged. (*Morillion v. Royal Packing Co., supra*, 22 Cal.4th at p. 579; *Satten v. Webb* (2002) 99 Cal.App.4th 365, 375.) In addition to the facts actually pleaded, we also may consider facts judicially noticed. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 877.)

B. *Res Judicata Analysis*

The issue before us is whether the judgment for BALC in the Virginia action acts as a bar on res judicata grounds to ePlus's reassignment claims because ePlus "could" and "should" have brought such claims in a cross-complaint or as a set off in the Virginia action.

Here, the parties appear to agree that Virginia law applies in determining the preclusive effect of the judgment in the Virginia action. The parties' briefs nonetheless rely on res judicata principles from both Virginia *and* California, which is consistent with the ruling of the trial court, which found, in sustaining BALC's demurrer without leave to

amend, that either under Virginia or California law ePlus's reassignment claims were barred because ePlus "could and should" have raised those claims in the Virginia action.

We conclude that regardless of whether Virginia or California law applies, the trial court erred in finding ePlus's reassignment claims were barred by the "merger and bar aspect of res judicata." We instead conclude under the FPA that such claims arose *after* the Virginia action had concluded, when ePlus satisfied the judgment in the Virginia action and according to ePlus's complaint, when BALC refused to reassign to ePlus all of its of right, title and interest in connection with the CBI equipment lease. As such, those claims were not ripe in the Virginia action.

1. *The FPA*

Section 7.3 of the FPA forms the basis of ePlus's reassignment claims. It provides: "Upon any receipt of the Unrecovered Investment under Section 7.1 . . . , [BALC] will grant to [ePlus] a Return Assignment of the applicable [equipment lease] and Equipment. No right or obligation of repurchase by [ePlus] hereunder shall at any time limit the exercise by [BALC] of any of its rights or remedies relating to any [equipment lease] as to which there exits a default, event of default or termination event." The FPA defines "Return Assignment" to mean "in respect of any applicable [equipment lease] and related Equipment, an assignment to [ePlus] by [BALC] of its right, title and interest in and to such [equipment lease] and Equipment, 'as is, where is,' without recourse or representation or warranty, express or implied."

In contrast, the Virginia action brought by BALC against ePlus was based on sections 5.2 and 7.1 of the FPA. Section 5.2 provides: "Notwithstanding anything herein

to the contrary, [ePlus] shall indemnify and hold [BALC] and its Affiliates harmless from and against any and all Losses arising from or relating to an Indemnity Event. [BALC] agrees to provide written notice to [ePlus], within thirty (30) days of [BALC] having actual knowledge thereof, or any claim for which [ePlus] would be obligated to indemnity [BALC] hereunder."

Section 7.1 states: "Within 10 days after notice from [BALC], [ePlus] shall pay [BALC] the Unrecovered Investment of any [equipment lease] if (i) such [equipment lease] is terminated for illegality or invalidity, or rescinded pursuant to rights granted by operation of law, or otherwise as a result of Lessor's conduct, or is determined in a legal proceeding to be unenforceable in whole or material part; or (ii) [ePlus] breached any of its representations or warranties to [BALC] contained in [the FPA] as to such [equipment lease]."

The FPA defines "Unrecovered Investment" in respect to any equipment lease to mean: "(i) all accrued and unpaid Payments then due and payable under the [equipment lease], (ii) all remaining Payments under the [equipment lease], discounted at the Discount Rate, (iii) all initial direct costs (not to exceed 1.5% of the sum of (i) and (ii) above), charges and expenses reasonably incurred by [BALC] in connection with such [equipment lease], and (iv) [BALC's] residual investment (as set forth in the Financing Request) at such time in respect of such [equipment lease]."

We review the interpretation of a contract de novo when, as here, there are no disputed material facts regarding its meaning. (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266-1267; *De Anza Enterprises v. Johnson* (2002) 104

Cal.App.4th 1307, 1314, 1315.) "The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the 'mutual intention' of the parties. 'Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id.*, § 1639.) The "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage" (*id.*, § 1644), controls judicial interpretation. (*Id.*, § 1638.)' [Citations.]" (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.)

We conclude the plain language of section 7.3 of the FPA required BALC, on its *receipt* of the unrecovered investment, to reassign to ePlus any and all right, title and interest arising under and in connection with the CBI equipment lease. The record shows BALC received payment from ePlus, that was substantially equivalent to the unrecovered investment, in late May, early June 2007, when ePlus paid BALC about $4.26 million in satisfaction of the judgment in the Virginia action. Thus, based on the plain language of section 7.3 of the FPA, BALC's contractual obligation to reassign the CBI equipment lease to ePlus arose in late May 2007, at the earliest, *after* trial and *after* the entry of

judgment for BALC in the Virginia action, which the record shows occurred in early February 2007.[6]

However, this is not the end of the analysis. We next consider whether ePlus was legally, as opposed to contractually, obligated to assert its reassignment claims in the Virginia action.

2. *Virginia Law*

Turning to Virginia law, we agree with ePlus that unlike California, discussed *post*, Virginia does not have a compulsory cross-complaint rule.[7] (See *Davis v. Marshall*

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6 We thus reject the allegation in ePlus's complaint that mandatory repurchase (section 7.1 of the FPA) and reassignment (section 7.3) are "concurrent, mutually dependent duties, to be performed simultaneously." For purposes of demurrer, our consideration of facts includes evidentiary facts found in exhibits attached to a pleading. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.) We note that facts pled in such exhibits, including the FPA in the instant case, control over any inconsistent allegations made in the pleadings. (*Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 955.)

7 BALC asserts in its brief ePlus did not raise the issue of Virginia's lack of a compulsory counterclaim rule in opposing BALC's demurrer, and therefore it is improper for ePlus to argue this issue on appeal. The record shows, however, ePlus did raise this issue in the trial court during oral argument, without objection by BALC. In any event, a party may raise a new issue on appeal if that issue is purely a question of law on undisputed facts. (*See Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1141; *Sheller v. Superior Court* (2008) 158 Cal.App.4th 1697, 1709.) We also note that at least in California, the compulsory cross-complaint rule embodies an aspect of res judicata, as each seeks to promote judicial economy by requiring parties to litigate all related claims between them. (See *Flickinger v. Swedlow Engineering Co.* (1955) 45 Cal.2d 388, 393; *Saunders v. New Capital for Small Businesses, Inc.* (1964) 231 Cal.App.2d 324.)

Homes, Inc. (2003) 265 Va. 159, 173 [576 S.E.2d 504, 511] [dissent].) Virginia does, however, allow permissive joinder. (Va. Code Ann. § 8.01-281, subd. (a).[8])

Thus, under Virginia law, for example, a party *may*, but is not statutorily required to, assert a claim for indemnity or contribution in the main action, or may pursue such a claim in a separate action, *after* payment is made and the claim accrues. (See Va. Code Ann. § 8.01-249, subd. (5) ["In actions for contribution or for indemnification, [the action accrues] when the contributee or the indemnitee has paid or discharged the obligation," although a claim permitted by Virginia Code Annotated section 8.01-281, subdivision (a), "may be asserted before such cause of action is deemed to accrue hereunder"]; see also *McKay v. Citizens Rapid Transit Co.* (1950) 190 Va. 851, 857 [59 S.E.2d 121, 123] [concluding that "[u]ntil the payment was made by the insurance carriers [to plaintiff] no right of contribution in their favor arose"].) Although under Virginia statutory law ePlus *could* have asserted its reassignment claims in the Virginia action by way of cross-complaint, we conclude it was not *legally* obligated to do so.

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8 "A party asserting either a claim, counterclaim, cross-claim, or third-party claim or a defense *may* plead alternative facts and theories of recovery against alternative parties, provided that such claims, defenses, or demands for relief so joined arise out of the same transaction or occurrence. Such claim, counterclaim, cross-claim, or third-party claim may be for contribution, indemnity, subrogation, or contract, express or implied; it may be based on future potential liability, and it shall be no defense thereto that the party asserting such claim, counterclaim, cross-claim, or third-party claim has made no payment or otherwise discharged any claim as to him arising out of the transaction or occurrence." (Va. Code Ann. § 8.01-281, subd. (a), italics added.)

Likewise, we conclude the res judicata doctrine does not, under Virginia law, bar ePlus's reassignment claims.[9] The "rationale for this judicially created doctrine . . . 'rests upon public policy considerations which favor certainty in the establishment of legal relations, demand an end to litigation, and seek to prevent the harassment of parties. . . . The doctrine prevents "relitigation of the *same* cause of action, or any part thereof which could have been litigated, between the same parties and their privies." ' " (*City of Virginia Beach v. Harris* (2000) 259 Va. 220, 229 [523 S.E.2d 239, 243], italics added, quoting *Bill Greever Corp. v. Tazewell Nat'l Bank* (1998) 256 Va. 250, 254 [504 S.E.2d 854, 856]; see also *Smith v. Ware* (1992) 244 Va. 374, 376 [421 S.E.2d 444, 445] [the res judicata bar prevents "relitigation of the same cause of action, or any part thereof, which could have litigated between the same parties and their privies"].)

For any judgment entered after July 1, 2006, such as in the instant case, rule 1:6 of the Rules of the Supreme Court of Virginia applies and addresses the element of res judicata requiring identity of the cause of action. (Va. Sup.Ct.Rules, rule 1:6, subds. (a) and (b); see also *Virginia Imports, Ltd. v. Kirin Brewery of America, LLC* (2007) 50 Va.App. 395, 410, fn. 6 [650 S.E.2d 554, ___ [observing rule 1:6 adopted the "transactional approach" for defining the term "cause of action" for purposes of res

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9 Because we conclude Virginia res judicata principles would not bar ePlus's reassignment claims if brought in Virginia, we conclude there also is no violation of the full faith and credit clause of the United States Constitution (U.S. Const., art. IV, § 1), which recognizes a "final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land." (*Baker by Thomas v. General Motors Corp.* (1998) 522 U.S. 222, 233 [118 S.Ct. 657].)

judicata, and noting rule 1:6 superseded that portion of the holding in *Davis v. Marshall Homes, supra,* 576 S.E.2d at p. 507, which had rejected the existing transactional approach and adopted the "same evidence test"]; *Smith v. Ware, supra,* 421 S.E.2d at p. 445 [among the four elements to establish res judicata is "identity of the cause of action"].)

Entitled "Res Judicata Claim Preclusion," rule 1:6 of the Rules of the Supreme Court of Virginia provides:

"(a) **Definition of Cause of Action.** A party whose claim for relief arising from identified conduct, a transaction, or an occurrence, is decided on the merits by a final judgment, shall be forever barred from prosecuting any second or subsequent civil action against the same opposing party or parties on any claim or cause of action that arises from that same conduct, transaction or occurrence, whether or not the legal theory or rights asserted in the second or subsequent action were raised in the prior lawsuit, and regardless of the legal elements or the evidence upon which any claims in the prior proceeding depended, or the particular remedies sought. A claim for relief pursuant to this rule includes those set forth in a complaint, counterclaim, cross-claim or third-party pleading."

Here, we conclude under Virginia law that ePlus's reassignment claims are not based on the same identified conduct, transaction, or occurrence that was asserted by BALC in the Virginia action. Instead, for purposes of res judicata, we conclude ePlus's reassignment claims arose out of and are based on conduct that is separate and distinct from the conduct that was at issue between these parties in the Virginia action. That both

the Virginia and underlying actions are based on the FPA does not change our conclusion. Indeed, as BALC notes, the FPA is an "umbrella agreement" between the parties, which we conclude is designed to set forth their rights, duties and obligations in connection with *multiple* third party lease agreements involving ePlus that are funded or purchased by BALC. (See, e.g., section 7.3 of the FPA, *ante*, which provides in part that "[n]o right or obligation of repurchase by [ePlus] hereunder shall at any time limit the exercise by [BALC] of any of its rights or remedies relating to any [equipment lease] as to which there exits a default, event of default or termination event.")

In addition, we note that approximately three years have elapsed between the breach of section 7.1, asserted by BALC in the Virginia action, and the (alleged) breach of section 7.3, asserted by ePlus in the underlying action that is at the heart of its reassignment claims. While BALC is correct in noting res judicata applies to actions that *could* have been brought in a former action, the doctrine does not apply to a matter arising after the former adjudication, such as the case at bar. (See, e.g., *Bates v. Devers* (1974) 214 Va. 667, 671, fn. 4 [202 S.E.2d 917, 921] ["[t]he barring of a cause of action 'which could have been litigated' is not directed to an unrelated claim which might permissibly have been joined, but, to a claim, which, if tried separately, would constitute claim-splitting. [Citations.]"; *Southern Ry. Co. v. Washington, A & Mt. V. Ry. Co.* (1904) 102 Va. 483, 491 [46 S.E. 784, 787] [res judicata does not apply "to a matter arising after the former adjudication, even in a second suit between the parties"]; *Winchester Neurological Consultants, Inc. v. Landrio* (2008) 74 Va.Cir. 480, 488, fn. 4 [" 'If the

cause of action in the second action arises after the rendition of the judgment in the first action, it is a different cause of action not barred by the prior judgment.' [Citation.]"])

The Virginia Supreme Court decision of *Aiglon Associates, Ltd. v. Allan* (1994) 248 Va. 150 [445 S.E.2d 138], is particularly instructive here. There, a shopping center landlord sued a tenant under a commercial lease to recover unpaid rent from the fourth month of the rent term through the date of judgment. (*Id.* at p. 139.) The landlord previously had sued the same tenant under the same lease and recovered damages for unpaid rent accruing during the first three months of the leasehold, attorney fees and expenses to restore the premises. The tenant alleged, and the trial court agreed, that the landlord's second suit was barred by res judicata. (*Id.* at pp. 139-140.)

In reversing, the Virginia Supreme Court construed the mandatory acceleration of rent clause in the lease agreement and determined it was applicable only upon the termination of the lease. (*Aiglon Associates, Ltd. v. Allan*, *supra*, 445 S.E.2d at pp. 139-140].) The court noted the evidence in the record showed the landlord did not elect to terminate the lease (and thus trigger the acceleration clause) by reentry or taking possession of the leasehold premises, in light of the requirement in the lease that the landlord provide written notice of its intention to terminate. (*Ibid.*) The court thus held res judicata did not bar the landlord's second lawsuit under the lease. (*Ibid.*)

Here, as we have discussed, the FPA, like the lease in *Aiglon*, was at issue in successive actions. Moreover, also like the parties in *Aiglon*, the *same* parties were involved in each action. Finally, although the Virginia Supreme Court did not address

the issue in *Aiglon*, it appears the landlord there, like ePlus here, *could* have asserted its claims in the previous lawsuit, if it was so inclined.

Nonetheless, the Virginia Supreme Court in *Aiglon* turned to the language of the written agreement (e.g., the lease) between the parties, as we have done here in construing sections 7.1 and 7.3 of the FPA. Based on its construction of the written agreement, the Virginia Supreme Court determined the landlord's subsequent action for the balance of the rent due under the lease was not barred by res judicata because the acceleration clause in the lease was not triggered, and thus the lease allowed for successive actions to recover unpaid rent.

Likewise, as noted above, we conclude the FPA provides ePlus a separate and distinct claim against BALC for the latter's (alleged) breach of section 7.3. We further conclude that claim arose when BALC *received* payment from ePlus substantially equivalent to BALC's unrecovered investment, as provided in section 7.1 of the FPA, and when BALC (allegedly) refused to grant ePlus a "return assignment" of the applicable equipment lease. (See section 7.3 of the FPA.) We thus conclude under Virginia law that ePlus's reassignment claims were not barred on res judicata grounds.[10]

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10 While we conclude res judicata does not bar ePlus's reassignment claims, we note neither BALC nor ePlus is precluded from asserting the collateral estoppel doctrine in the underlying action, to prevent relitigation of issues of fact actually litigated between the parties in the Virginia action. (See *Bates v. Devers, supra*, 202 S.E.2d at p. 921 [discussing the elements of collateral estoppels.)

3. *California Law*

As noted *ante*, unlike Virginia, California does have a compulsory cross-complaint rule. (Code Civ. Proc., § 426.30, subd. (a).) Code of Civil Procedure section 426.30, subdivision (a), provides in part: "Except as otherwise provided by statute, if a party against whom a complaint has been filed and served fails to allege in a cross-complaint any related cause of action which (*at the time of serving his answer to the complaint*) he .has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded." (Italics added.)

Assuming, without deciding, the reassignment claims of ePlus were "related" to those in the Virginia action for purposes of Code of Civil Procedure section 426.30, subdivision (a), under California statutory law ePlus would not have been required to assert such claims in a cross-complaint in the Virginia action because they did not exist when ePlus *severed its answer to* BALC's "amended motion for judgment" (e.g., complaint). Instead, those claims arose in June 2007, after ePlus satisfied the judgment in the Virginia action and after BALC allegedly refused to reassign to ePlus all of BALC's right, title and interest in and to the CBI equipment lease.

Likewise, ePlus would not be barred by res judicata, as applied in California, because we conclude its reassignment claims are based on a separate and distinct breach of the FPA, and thus a different "primary right" than those claims brought by BALC against ePlus in the Virginia action. (See *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 904 [noting California's res judicata doctrine is based on the primary right theory]; *Title Guarantee & Trust Co. v. Monson* (1938) 11 Cal.2d 621, 632-633

[concluding that successive actions between the same parties were based on a breach of a separate covenant at different times, and thus the judgment in the first action did not bar the plaintiff from bringing the second action]); *Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1067 [in determining whether a later proceeding is based on the same primary right as in an earlier action, courts will "compare the two actions, looking at the rights which are sought to be vindicated and the harm for which redress is claimed."])[11]

C. *Ruling on the Sufficiency of the Complaint*

Finally, there is a disagreement between the parties whether this court should decide whether ePlus's reassignment claims are supported by sufficient facts to pass muster on demurrer. ePlus, on the one hand, argues its causes of action are legally sufficient and valid. It further argues BALC's contention that the reassignment claims are invalid, because BALC did not seek "specific performance" in the Virginia action, is a non sequitur and, in any event, also an impermissible attack on the *merits* of such claims.

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11 Although we conclude res judicata does not bar ePlus's reassignment claims, we note that to the extent the doctrine had applied, BALC potentially would receive a windfall. The record shows BALC submitted a claim of $3,140,087.88 in the Teleservices bankruptcy and a similar claim in the CBI bankruptcy, both of which it made *after* ePlus satisfied the judgment in the Virginia action and ostensibly made BALC whole in connection with the fraud by Teleservices and CBI. We thus need not decide in this appeal whether the application of res judicata to ePlus would result in any "manifest injustice" to ePlus, or whether this equitable exception is still viable under our law. (See *Slater v. Blackwood* (1975) 15 Cal.3d 791, 796 [noting California authority refusing to apply res judicata when to do so would result in manifest injustice, but further noting the continued validity of that exception is "doubtful," although concluding it was unnecessary to overrule the exception because there was no manifest injustice in the case before it].)

BALC, on the other hand, contends this court need not, and should not, reach the issue of whether ePlus's reassignment claims are supported by sufficient facts for purposes of demurrer. Because this issue was not before the trial court, BALC further contends our ruling on the legal sufficiency of each of ePlus's reassignment claims would amount to an "advisory opinion." (See *DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150, 196.)

In light of the fact BALC's demurrer did not challenge the legal sufficiency of ePlus's reassignment claims (other than on the basis of finality), we conclude it is unnecessary to take up that issue in this appeal.

DISPOSITION

The judgment of dismissal is reversed and the case remanded for further proceedings in accordance with this opinion. ePlus to recover its costs on appeal.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

IRION, J.